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Article (Published Version)

Frabboni, Maria Mercedes (2020) Fashion designs and brands: the role of the informed user and the average consumer. *Journal of World Intellectual Property*, 23 (5-6). pp. 815-831. ISSN 1422-2213

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# Fashion designs and brands: The role of the informed user and the average consumer

Maria Mercedes Frabboni 

School of Law, Politics and Sociology,  
University of Sussex, Brighton, UK

## Correspondence

Maria Mercedes Frabboni, School of Law,  
Politics and Sociology, Freeman Building,  
University of Sussex, BN1 9QE Brighton, UK.  
Email: [M.M.Frabboni@sussex.ac.uk](mailto:M.M.Frabboni@sussex.ac.uk)

## Abstract

The notions of the informed user and average consumer occupy centre stage in design and trade marks disputes. The current European Union legal framework exposes a tension between these notions as legal constructs informed by normative objectives, and the need to connect them with the business reality of design and trade mark practice. This article investigates how litigation concerning fashion design and brands addresses this tension and shapes the definition and application of legal tests for the informed user and the average consumer. It analyses key criteria that determine who these notional persons are, and how those criteria are applied when performing assessments that combine abstract legal standards with information acquired from the experience that real users and consumers make of fashion designs and brands.

## KEYWORDS

European Union, fashion law, industrial designs, intellectual property rights, trade marks

## 1 | INTRODUCTION

The informed user and the average consumer regularly feature in legal questions that the judiciary, legal practitioners and commentators face in the field of design and trade mark law in Europe. They are key characters playing

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a decisive role in the determination of the framework, objectives and functioning of design and trade mark laws. Their true likeness, however, remains uncertain.

In its statutory inception, the notion of the informed user is introduced in Article 5(1) of Directive 98/71/EC (the Design Directive): "A design shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public ...". The informed user's perspective is a necessity to test the individual character of a design and therefore its validity, and in the determination of the scope of protection as established under Article 9 of the Directive. The notion of average consumer evolves from misleading advertising and competition cases, to inform subsequent definitions in trade mark cases (Davis, 2005, pp. 185–186). This is formally recognised by the Court in *Procter & Gamble*, where it is stated that "in any assessment of the distinctive character of the mark for which registration is sought, account must be taken of the presumed expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect" (*Procter & Gamble v. OHIM*, 57).<sup>1</sup> The average consumer's perception of a trade mark is fundamental, as a key requirement to the determination of the boundaries of trade mark protection both in relation to subsistence and infringement. Nevertheless, it has been argued that "the existence of the average consumer is itself a matter of trust rather than science" (Davis, 2005, p. 185), to underline the assumptions, at times highly theoretical, that need to be made to establish correct thresholds.

A rigorous analysis of the link between each of these two characters as legal constructs and the way they may reflect a true experience by real persons of a design or trade mark can be effectively guided and informed by considering fashion designs and brands. This is because of the specific characteristics of apparel and fashion accessories, which cannot be ascertained properly before purchase but only through the actual, seasonal and sensory experience of the commodity and its trends.

A close interrelation exists between the appreciation of what such experience entails and the definition of the role and influence of the informed user and average consumer. Accordingly, a preliminary submission can be made: the closer the determination of the informed user or average consumer is to the reality of the relevant industries and markets, the more influential the actual consumer or the actual user is in acting as a coregulator within the legal framework of design and trade mark laws respectively,<sup>2</sup> and as a channel of communication towards the appreciation of the intangible value of the commodities in question. The focus of the analysis contained in this article is the assessment of the principles and policies that determine the fine balance between a necessary degree of simplification that permits the implementation of a workable legal framework and the transposition of reality in the definition of these legal persons.

The challenges faced in the quest for an effective balance are a testimony to the fact that fashion design and fashion brands embody a sophisticated interconnection between beauty, usefulness and commerce (Cornish, 2004, p. 81; Suthersanen, 2013, p. 381). A detailed understanding of this interconnection and of the way it affects normative approaches contributes to the formulation of an answer to the following question: if the informed user and the average consumers are not real persons, which type of fictional legal persons are they? A starting point for the analysis rests within the very meaning of the word "persona". Looking at its etymology, *persona* is the mask worn by actors, for example, in ancient Greek theatre (Hoad, 2003).<sup>3</sup> A mask was made up to exaggerate some of the somatic traits of a character, and its function was to work as a resonance chamber for that character in a play. Overall, it was the instrument to transform a myth into reality (Nietzsche & Smith, 2000, p. 59). In this article, the steps taken to discern the notions of informed user and average consumer are driven by the similar premise that the characteristics of the notional user or consumer are simplifications, exaggerations, elaborations of the traits of real users or real consumers of apparel and fashion accessories. From this premise, the article seeks to analyse how these legal fictions could be interpreted as partial manifestations of real experiences by users and consumers of fashion designs and brands, and of the working mechanisms of the fashion industry.

The first part of the article explores the legal basis of the notions of informed user and average consumer under European Union (EU) design and trade mark law, to illustrate the formal reasoning required to carry out an accurate

assessment of who those persons may be. This part will show that, in the task of defining the experiences of the informed user and of the average consumer, compromises need to be reached between abstract definitions which prioritise the goals of objectivity and legal certainty, and the inclusion of factual or empirical traits of users' reactions to designs and consumers' perceptions of trade marks. The second part of the article identifies the characteristics of the assessment of the informed user's reaction to designs applied to apparel and fashion accessories through the lens of decided cases. This is followed by an analogous exercise in relation to the perception of brands by the relevant consumer in trade mark law in the third part of the article. These two parts evaluate and interpret the many technicalities that are involved in the process of establishing such characteristics and highlight the normative adjustments that intervene in the identification of the tasks that the informed user or the average consumer are called to perform. By way of this analysis, the article demonstrates that the use of a normative approach in the way these two notional persons are construed does not completely exclude an interpretation that reflects the engagement of users and consumers in an actual participatory experience of fashion commodities.

## 2 | LEGAL FICTIONS AS APPLIED TO REAL PRODUCTS

This section of the article introduces the informed user and average consumer as fictional *personae* who are construed in accordance with the parameters set out by law but may reflect, to a degree, the reality of the way the relevant commodities are experienced. A comprehensive account of decided cases is beyond the scope of this paper. The paragraphs below make reference to legislation and a selection of decisions as signposts to the reader in the development of a narrative which focuses on experiences of fashion designs and brands that inform the legal tests in question.

The informed user is brought into existence by Article 5(1) of the Design Directive and Article 6(1) of Council Regulation (EC) No. 6/2002 (the Design Regulation). Its definition is specifically qualified by jurisprudence. "The concept of the 'informed user'... must be understood as lying somewhere between that of the average consumer, applicable in trade mark matters, who need not have any specific knowledge and who, as a rule, makes no direct comparison between the trade marks in conflict, and the sectoral expert, who is an expert with detailed technical expertise. Thus, the concept of the informed user may be understood as referring, not to a user of average attention, but to a particularly observant one, either because of his personal experience or his extensive knowledge of the sector in question" (*PepsiCo Inc v. Grupo Promer Mon Graphic SA*, 53).<sup>4</sup> It is submitted that it is not necessary to provide a true-to-life image of the informed user for that notion to fulfil its function in the context of the relevant legal framework because the informed user remains "an abstract concept—someone who is knowledgeable without being an expert—rather than a real person whose views could be investigated empirically" (Kur, 2018, p. 182).

The EUIPO Guidelines on registered Community designs indicate that "[t]he status of 'user' implies that the person concerned uses the product in which the design is incorporated, in accordance with the purpose for which that product is intended" (EUIPO, 2020, Examination of Design Invalidity Applications, p. 128). In this respect, it has been argued that the tendency emerging from case law to adopt a literal understanding of the term "user" does not fully reflect the underlying objective of EU design law to protect "design for its value as a marketing tool in the marketplace" (Cornwell, 2016, p. 330). Too much emphasis has been put on the term "user" rather than on what qualifies as the task of such a user namely the fact that he or she is "informed". On the contrary, "overall impression should be assessed from the perspective of a notional person knowledgeable and active at the point of exploitation of the design on the market" (Cornwell, 2016, p. 332) and for this reason, it would be more appropriate to look at the perception of a potential purchaser or distributor.

The way the user experiences the design acquires further significance under the approach detailed in Recital 14 of the Design Regulation. This refers to the design corpus, the nature of the product, and the industrial sector as additional elements deemed to influence the reaction of the informed user in the process of assessing the individual character of a design. Commentators have observed that Courts have taken these additional elements into account,

even if recitals have no direct legal effect but do assist as interpretative tools. The authors of the 2016 Legal review on industrial design protection in Europe called for a clarification on this point as they observed that “[I]n the *Karen Millen* decision [C-345/13] ... the CJEU made two slightly contradictory statements. It noted that the accepted legal position was that the recitals of Regulations have no direct legal effect. Nevertheless, the CJEU went on to add that the reference to “existing design corpus” in Recital 14, in this case, was not inconsistent with Article 6, although the phrase is absent in the body of the Design Regulation itself” (European Commission, 2016, p. 69).<sup>5</sup> It could be argued that, in doing so, Courts have added components that reinforce the role of the informed user as the glue that brings together legal standards and the reality and experience of the design of the product in question. However, it is also important to recognise the effect that an approach driven by empiricism or pragmatism may have on the degree of uncertainty and subjectivity of the assessment to be carried out, in addition to the burden of the costs involved in the gathering empirical evidence. As illustrated below, normative adjustments filter the reasoning and feed into the application of the legal test.

The process of identifying the average consumer in trade mark law raises similar challenges. The average consumer is deemed to be reasonably observant, reasonably well-informed and circumspect (*Procter & Gamble v. OHIM*, 57). The expression “average consumer” itself cannot be found in statutes, but case law indicates how this notional person plays a key role in several areas of trade mark law (Keeling et al., 2017, 3-001). To gauge this concept, the EUIPO Guidelines on EU trade marks recall that “[t]he term ‘average consumer’ is a legal concept that is used in the sense of the ‘relevant consumer’ or ‘relevant public’” (EUIPO, 2020, p. 819), both actual and potential. On the basis of the appreciation of the goods or services that form part of the assessment, “the Court normally distinguishes between the general public (or the public at large), and a professional or specialised public (or business customers)” (EUIPO, 2020, pp. 819–820).

In certain instances, the relevant public would be a specialised one, perhaps even a brand-conscious one. In other instances, it would be a general one.<sup>6</sup> It follows that the average consumer is someone with a level of attention that is likely to vary according to the category of goods or services in question (*Lloyd Schuhfabrik Meyer v. Klijsen Handel BV*, 26).<sup>7</sup> It is insightful and explanatory that the Guidelines refer specifically to luxury goods such as diamonds, precious and semiprecious stones to indicate that consumers would “put a certain amount of thought into the selection [and therefore a] relatively high degree of attention on the part of the consumer may be assumed” (EUIPO, 2020, pp. 824–825). The discussion below indicates that not all fashion is synonymous with luxury and that, within the fashion industry, the level of attention of the notional consumer varies considerably.

With regard to the issue of uncertainty and subjectivity raised above, Dinwoodie & Gangjee (2016, p. 345) submit that a tension exists between an empirical and normative conception of the consumer in trade mark law. A definition of the average consumer that is mainly based on empirical grounds would focus on ways of measuring actual consumers’ perception or behaviour. A normative approach would seek to find default characteristics for the average consumer, which would include elements of how the consumer should be assumed to behave (Dinwoodie & Gangjee, 2016, pp. 345–346). Ultimately, this is the same tension between myth and reality that this article seeks to address.

Against the background established in this section where some primary characteristics of the notional users and consumers have been identified, the analysis now proceeds with an assessment of how those characteristics are recognised in the context of a legal framework that translates, filters and formalises users’ and consumers’ experience of apparel and fashion accessories.

### 3 | THE INFORMED USER'S REACTION TO FASHION DESIGN: DEALING WITH REAL PRODUCTS AND THE RELEVANT INDUSTRY SECTORS

The process that a judge is called to undertake when wearing the spectacles of the informed user requires putting into words what designs look like, and often this “takes longer to say than to see”.<sup>8</sup> An argument that follows from

this observation is that “it should be possible to decide a registered design case in a few hours”, given that the place for evidence is very limited.<sup>9</sup>

Nevertheless, the judge's task is to put into words a visual and nonverbalised scenario<sup>10</sup> enriched by the knowledge and experience of the informed user. Accordingly, in this task, a judge may have an initial perception of the design that differs from what eventually emerges once the informed user's knowledge and experience are taken into account.<sup>11</sup> The determination of the level of knowledge and experience brought into the assessment by the notional user sets the degree of simplification or, conversely, of sophistication that goes into the relevant assessment of the design(s) and, as a result, the extent to which a user's pragmatism permeates the implementation of a legal test. The paragraphs below explain the significance of this point.

In the UK, the High Court in *J Choo v. Towerstone* defined the informed user for the design of the handbags under consideration as “someone with a knowledge of handbag design; not the woman in the street, not a handbag designer. Such a person would know about the design constraints inherent in handbag design, what features were necessary and unnecessary, and so on” (*J Choo v. Towerstone*, 7).<sup>12</sup> With this portrayal in mind, the question that relates to the overall impression produced by the design on the informed user ought to be formulated at an appropriate level of generality. The Court acknowledged that, from a highly detailed examination of features of the two designs under discussion, some differences existed but found that the overall impression produced on the informed user was exactly the same. The word “overall” seems key in this reasoning. Accordingly, in the process of examining the claimant's design and the alleged infringement, the relevant assessment should be made from a “standing back” position (*J Choo v. Towerstone*, 13), to avoid or limit the degree of subjectivity that could arise if one is distracted by irrelevant or barely noticeable details (Stone, 2008, p. 551).

### 3.1 | Novel combinations of fashionable designs and trends

At this stage of the analysis it has been determined that, in order not to be distracted by irrelevant details, the informed user may have to stand back. The next issue addressed in this section examines the way the task of the person in charge of the legal assessment is shaped by the informed user as he or she deals with earlier designs.

In *Karen Millen* the Court held that a design has individual character if the overall impression which that design produces on the informed user is different from that produced on such a user “not by a combination of features taken in isolation and drawn from a number of earlier designs, but by one or more earlier designs, taken individually” (*Karen Millen v. Dunnes Stores*, 35).<sup>13</sup> With this decision, the Court rejected the amalgam theory. The informed user should consider one or more earlier designs, and not an amalgam of earlier features picked and chosen in isolation. Arguably, the rejection of the amalgam theory has a direct consequence for fashion designers who can “be confident that their designs will be protected, even if they are a novel combination of existing design features” (Stone, 2015, p. 622).

Due to the special nature of fashion products and the industry concerned, it seems logical to review the impact of trends on the informed user's knowledge and experience of early designs. In the case of *Senz Technologies BV v. OHIM*, the design in question was for a fashion accessory consisting of a wind-resistant umbrella, and the informed user was defined “as someone wishing to use an umbrella, who needs to purchase one and who has become informed on the subject” (*Senz Technologies BV v. OHIM*, 41).<sup>14</sup> Such a general definition should not induce the reader into the error of thinking that the informed user could be anyone. The definition of informed user for this case is further elaborated by indications concerning the user's level of attention. “[C]ase-law shows that, unlike the average consumer in the field of trade marks for which the fact of being faced with a fashion accessory may in fact play a role in the consumer's level of attention... the informed user of a design is already by nature a person who has a particular interest in the design of a given product and who is interested in trends in design, art and fashion which might be behind the emergence of such a design. Thus, the fact that such a product may or may not be considered a fashion accessory is irrelevant for the determination of the level of attention of the informed user”

(*Senz Technologies BV v. OHIM*, 51). This approach formulates that, once the level of attention of the informed user has been correctly determined, in the assessment of overall impression it would not be appropriate to give additional weight to trends.

This echoes an earlier explanation of the General Court that “the question whether a design does or does not follow a general design trend is relevant, at the most, in relation to the aesthetic perception of the design concerned and can therefore, possibly, have an influence on the commercial success of the product in which the design is incorporated. By contrast, it is not relevant in the examination of the individual character of the design concerned, which consists in verifying whether the overall impression produced by it differs from the overall impressions produced by the designs made available earlier, irrespective of the aesthetic or commercial considerations” (*Shenzhen Taiden Industrial Co. Ltd v OHIM*, 58).<sup>15</sup> Thus, trends and commercial success are to be distinguished from the concept of saturation of the state of the art. While trends and commercial success should not affect the assessment of overall impression on the informed user, saturation of the state of the art is relevant “in so far as it could be capable of making the informed user more attentive to smaller differences in shapes and proportions” (*Antrax It v OHIM-THC*, 89; Barazza, 2013, p. 269).

The normative approach of purposely omitting the impact of trends in the application of the legal test affirms the need to focus on the appearance of a product, not its commercial success. While an actual user naturally reacts to trends, the fictional informed user undergoes a different experience that is filtered and purified from what is in vogue.

### 3.2 | The degree of freedom of the designer

Thus far it has been determined that, in order not to be distracted by irrelevant details, the informed user may have to stand back and look at earlier designs without consideration of trends. The analysis of a second case concerning handbags, which focuses on the degree of freedom of the designer, provides further elements that assist in the understanding of why an additional tier of knowledge is required to appropriately ascertain the reaction of the informed user. Consideration of the constraints related to the freedom of the designer (as required under Article 5(2) of the Design Directive and Article 6(2) of the Design Regulation, and analogously under Article 9(2) of the Design Directive and Article 10 of the Design Regulation in relation to the scope of protection) could allow one to step further away from a purely artificial, abstract or merely normative definition of the informed user. The decision in *H&M v. Yves Saint Laurent*<sup>16</sup> concerned a claim for invalidity brought on the ground that the design for a Yves Saint Laurent's handbag lacked individual character. The General Court shed light on how the assessment in the eyes of the informed user should be connected to the industrial sector to which the commodity belongs, and how the degree of freedom of the designer would influence such an assessment. It confirmed that the role of the informed user should be read in the context of a four-stage examination for individual character, as set out in *PepsiCo*<sup>17</sup> and widely used in jurisprudence.<sup>18</sup>

Firstly, the examination should focus on identifying the relevant sector “to which the products in which the design is intended to be incorporated or to which it is intended to be applied belong” (*H&M v. Yves Saint Laurent*, 32). The second step is centred on defining who the informed user is, on the basis of the purpose of the products in question. The informed user, undisputedly identified as “an informed woman who is interested, as a possible user, in handbags” (*H&M v. Yves Saint Laurent*, 23), would be further qualified by her degree of awareness of the prior art, and the level of attention she would employ in making a preferably direct comparison of the designs (*H&M v. Yves Saint Laurent*, 32). The third element of this examination consists in establishing the degree of freedom of the designer. The fourth step should provide the outcome of the comparison of the designs in light of the previous three stages of the examination, and therefore such outcome has to take “into account the sector in question, the designer's degree of freedom and the overall impressions produced on the informed user by the contested design and by any earlier design which has been made available to the public” (*H&M v. Yves Saint Laurent*, 32).<sup>19</sup>



By taking these steps in turn it is possible to grasp the strength of the links between the legal test to be applied and the characteristics of the product and sector concerned. The application of the four-stage approach as formally set out by the Court calls not only on the evaluation of the overall impression produced on the person of the informed user, but also on the knowledge and input of a second key figure, the designer. It has been argued that “users will ‘only rarely’ have a true idea of the freedom available to the designer” (Cornwell, 2013, p. 286, fn 114).

Paradoxically, this may complicate things due to the fact that the legal test would require an answer to a further set of questions. Who is the designer in this case? Are all handbag designers subject to the same freedom, or is it necessary to differentiate between different categories of handbag design? Ultimately, to which extent is the overall impression on the informed user affected by the knowledge of the designer's degree of freedom, given how complicated to ascertain this could be? In answer to this last question, the Court observed that in the presence of a high degree of freedom for the designer of fashion items like handbags, it is less likely it is that minor differences between the designs at issue will be sufficient to produce different overall impressions on an informed user. The Court confirmed the findings of the Board of Appeal that the Yves Saint Laurent's design produced an overall impression on the informed user which was different from that produced by the earlier design. It is significant that the Court reiterated that the factor relating to the freedom of the designer is not an independent one, but makes it possible to reinforce or moderate the user's perspective in the assessment of the individual character of the contested design (*H&M v. Yves Saint Laurent*, 35).

A point that remains controversial and debated is that the evaluation of the freedom of the designer ought to take into account only technical constraints or standards imposed by regulation. For example, in the expanding field of wearable technology, the degree of freedom of a designer of an electronic wristband is limited by the technical constraints which apply to those wristbands which need to be ergonomic to fit the wrist and to contain measuring instruments. Such wristbands also need to be relatively small, thin and light and to fit easily around the wrist to fulfil their function properly (*Thomas Murphy v EUIPO*, 41).<sup>20</sup>

Conversely, a design trend should not be considered as a factor which restricts the freedom of the designer, “since it is precisely that freedom on the part of the designer which allows him to discover new shapes and new trends or even to innovate in the context of an existing trend” (*Antrax It v OHIM-THC*, 95). The same applies to the market or consumers' expectations. Taking as an example a controversy concerning the design of a Porsche 911, representatives for the German car manufacturer argued that the freedom of the designer when developing the design for a new edition of this model of car was limited by the fact that consumers expect iconic design features to be kept in all new models of the car (*Porsche v EUIPO*, 53).<sup>21</sup> The General Court rejected this argument and agreed that market expectations should not be a factor in the definition of the degree of designer's freedom (*Porsche v EUIPO*, 62).

An interpretation that only considers technical constraints or standards imposed by regulation emphasises and favours the potential for innovation available to a designer even when incentives created by the market and by consumers would encourage repetition. Nevertheless, an argument persists to include more market-orientated or consumer-driven considerations as constraints that can be taken into account in the assessment of the freedom of the designer. This is documented and discussed by Cornwell who evaluates the normative significance and potential impact of the two approaches as follows: “If a narrow view is taken (for example, limiting relevant constraints only to technical or other strictly mandatory requirements), fewer similarities between designs can be discounted as the subject of ‘standardisation’ between products. The greater variation between designs will be required and fewer designs will be protected a result, albeit with a wider scope of protection. In contrast, the wider the net is cast in terms of relevant constraints (for example, including more market-oriented or consumer-driven considerations), the more often design features may be treated as resulting from standardisation and the more often small differences in design may be taken to stand out in the eyes of the informed user, thereby conferring individual character. The threshold of entitlement to protection will be lower: more designs will be protected but with a narrower scope of protection” (Cornwell, 2016, p. 334).

As the analysis now proceeds with the investigation of the notion of the characteristics of the average consumer and his or her perception of branded fashion commodities, it is helpful to acknowledge that the



assessment of the users' reactions as presented in case law blends a sophisticated elaboration of factual knowledge and normative priorities (Kur, 2018, p. 182) in a process that requires putting into words a nonverbalised experience of fashion.

## 4 | THE AVERAGE CONSUMER'S PERCEPTION OF DESIGNERS' BRANDS

In the fashion industry, designs and trade marks play different roles. While often a certain design may quickly come in and out of fashion and could be reintroduced with modifications years later, a trade mark affixed on a garment, a pair of shoes or a fashion accessory can become a constant for the establishment and recognition of the brand. In light of these competitive dynamics, an incentive exists "for fashion companies to create an association between their trade marks and their most successful new features and products" (Jimenez & Kolsun, 2016, p. 156). In this scenario, it is submitted that the notion of the average consumer in trade mark law has the potential to play a key part in bridging the gap between the concept of a trade mark as an asset in the hands of the trade mark owner and the actual impact of the brand on the general public and the markets affected. This approach draws upon the meaningful distinction that exists between "the nominal, symbolic trade mark ... and the wider concept of the brand" (McDonagh, 2015, p. 616) as effectively depicted by examples within the fashion industry. In this sense, it is significant to bear in mind that "[i]t is a feature of the current marketplace obsession with brands ... that the brand may now constitute the primary consideration when consumers make their purchasing choices, with the particular goods against which it is registered as only a secondary consideration" (Davis, 2005, pp. 202–203).

The role of empirical evidence in EU trade mark law is uneasy and controversial (Weatherall, 2017, p. 59). Consumer perception is key when considering whether a sign could be a source indicating signal (for subsistence) or if a mark is too close to another and causes consumer confusion (for infringement; Gangjee, 2017, 1). However, "the fact that the confusion test is often applied as a series of abstract, even formulaic, factors drives a wedge between the *inter partes* registrability/infringement action and the reality of consumer perception" (Fhima, 2014, p. 686). There is a theme in European decisions that discard the validity of some types of empirical evidence as "not relevant to determining the response of the average consumer to a mark, because the legal test relates to a hypothetical, rather than a real consumer, whose responses are assessed as a normative matter" (Weatherall, 2017, p. 66).

In light of the significance of this theme, it is appropriate to take the fashion industry as a useful source of examples from a sector that heavily relies on brands and is highly reactive to the way the consumer selects, buys, wears and interacts with branded apparel and fashion accessories. This is a line of enquiry that reflects a dialogue that exists between the consumer and the brand recognised under the law, described as a "fluidity both of the person's identity and of the brand's image, [which] gives the consumer-brand relationship an open-ended quality, potentially encompassing an ongoing series of performances that ceaselessly give pleasure (of whatever kind) to the consumer, while simultaneously raising the status of the brand's image" (McDonagh, 2015, p. 629). This reasoning addresses the effect of repeated acts of social engagement with the law by an individual using a fashion brand. Ultimately, it contributes to demonstrate that "a brand's image has no meaning without collectively shared references" (McDonagh, 2015, p. 630). Without dismissing the reasons for a cautious attitude towards empirical evidence, the argument developed below is that a designer's name and brand acquire meaning through the purchasing public.

### 4.1 | The designer's name

From the characterisation of consumers' preferences which focuses on the social meaning of the use of the brand, the name of a designer is often decisive to the promotion of a certain style. That name could be presented in full at times, or as an acronym or a single letter that consumers learn to associate with a given fashion label

(Giannino, 2017, p. 268). That name can become a badge of such a style and operate as a source indicating signal even when the designer is no longer creating it, as addressed in *Millen v. Karen Millen Fashions Ltd* [2016] EWHC 2104 (Ch). Designers are advised that, if they decide to sell their business and the deal includes their name, they are likely to be unable to trade under that name again, unless the business they sold runs into financial difficulties and they can buy the trade mark back (Burbidge, 2019, p. 46).

To appreciate the way a sign consisting of the name of a designer—also known as patronymic sign—can serve the functions of a trade mark, it is useful to address how the average consumer perceives such mark when the individual bearing the name of the label is no longer a designer for that fashion house. Consumers are considered to be “aware that fashion businesses of all kinds diversified into a wide and widely differing variety of associated products, at many different price levels” (*Millen v. Karen Millen Fashions Ltd*, 60). In other words, consumers are aware that designers may lend their name to products that belong to sectors that are not strictly related to fashion collections, they do not have “a rigid division in mind between, for example, accessories like belts on the one hand and homewares like towels or candles on the other” (*Millen v. Karen Millen Fashions Ltd*, 62) and they also know that “not all of a brand's goods are for sale in the same place or at the same time” (*Millen v. Karen Millen Fashions Ltd*, 97). Nonetheless, the law is clear in establishing that there should be no protection for signs which are of such a nature as to deceive the public (Article 3(1)(g) of Directive 2008/95/EC, now under Article 4(1)(g) of Directive (EU) 2015/2436). This characterisation of consumers' attitudes towards the use of patronymic signs as fashion brands is compelling as it emerges from a series of factual considerations submitted as evidence, but those considerations are used selectively to build a picture of the notional consumer in light of commercial implications of IP transactions.

This picture, therefore, illustrates that the law is called to intervene when the dialogic relationship between the public and the brand is unquestionably compromised, for example, as the meaning and perception of a mark are completely distorted. In *Elizabeth Florence Emanuel v. Continental Shelf 128<sup>22</sup> Ltd*, the designer had founded a business using her own name. After a few years, she assigned the business to a company. This assignment included all assets of the business including its goodwill and an application to register the trade mark “Elizabeth Emanuel”. The designer eventually left the company but subsequently opposed the application made by the beneficiary of the assignment to register the trade mark “ELIZABETH EMANUEL” and lodged an application to revoke the previously assigned “Elizabeth Emanuel” trade mark.

The Court was called to identify the circumstances in which a mark that corresponds to the name of the person who initially designed and manufactured the goods bearing the mark could be of such a nature to deceive the public. It held that there needed to be “existence of actual deceit or a sufficiently serious risk that the consumer will be deceived...” (*Elizabeth Florence Emanuel*, Burbidge, 2019, p. 47). The average consumer might have been influenced in the act of purchasing a garment bearing the trade mark by imagining that Elizabeth Florence Emanuel had been involved in the design of that garment (*Elizabeth Florence Emanuel*, 48). The same consumer however would have not been subject to the deception which is the focus of Article 3(1)(g) of Directive 2008/95/EC, as the characteristics and the qualities of that garment remained guaranteed by the undertaking which owned the trade mark (*Elizabeth Florence Emanuel*, 48). From this perspective, to a degree consumer perception continued to play a role in the process of establishing the appropriate balance (Fhima, 2017, p. 328). The findings, in this case, reinforce the view that the marks and the brand in question are assets within an industry where assignments of rights by designers are regularly made. A reasonably well-informed and reasonably observant and circumspect consumer as formally construed under the law would be aware of this information which would be factored in the assessment.

Significantly, this decision helps in the understanding that that consumer perceives a sign and experiences it as a source indicator as well as a commercial asset for the trade mark owner. From a policy perspective, this reflects that the objectives of trade mark law combine the pursuance of undistorted competition with other concerns that apply *inter alia* to the consumer. Griffiths explores the complexity involved in combining and balancing such normative objectives and highlights how CJEU case law sees trade marks as essential instruments for the achievement of undistorted competition, because they enable “firms to brand products and differentiate them from

others of the same kind, which turns them into specific objects of demand and facilitates their marketing and promotion to consumers” (Griffiths, 2017, p. 127).

This, however, does not prevent the fact that consumers may be drawn towards a familiar trade mark and influenced by it for reasons that are not always consistent with or related to undistorted competition. This happens, for example, when that trade mark provides “consumers with a convenient reference point that they can use to shorten complex and burdensome decision-making...[or] because of its emotional impact”, with consequences that do not necessarily promote socially valuable forms of competition (Griffiths, 2017, pp. 128–129). In light of this assessment, it is possible to grasp the significance of the argument put forward by Dinwoodie and Gangjee that protection of actual consumers is not the only objective but a prime concern of trade mark law and accordingly “the consumer is not simply a fiction through which to determine appropriate forms and levels of competition” (Dinwoodie & Gangjee, 2016, p. 370; see also Cornish, 2004, p. 114).

## 4.2 | Purchasing designers' apparel via the Internet

The internet is a sphere where a full array of objectives have developed, and works as a resonance chamber of how markets react to trade mark law and enforcement. The opportunity to buy branded products via online retailers adds a further dimension to the formal assessment of the consumer's experience of a brand as developed on the basis of the characteristics of the relationship between the purchasing public and a brand. Accordingly, the definition of average consumer has been challenged by one of its variations—namely the internet user—who often searches for and selects apparel and fashion accessories through the screen of an electronic device. A debate emerged as to whether EU jurisprudence identified or perhaps even created another version of the average consumer, and if the experience and characteristics of the internet user emerging from this jurisprudence bring the legal assessment closer or further away from reality (Davis, 2015, pp. 15–16).

*Google France, Google Inc v. Louis Vuitton Malletier* contributes to the discussion on the value of a fashion brand to online retailers and search engines, and discusses the internet user's experience and perception of online advertising.<sup>23</sup> In this decision, the Court provided an account of the working mechanisms of Google's Adwords service (Google Ads), which is prompted when an internet user searches for a designer's name through the Google search engine. Google's Adwords service enables any economic operator to make a “reservation” for one or more keywords and, as an effect of such reservation, to obtain the placing of an advertising link to its site when an internet user enters a request in the search engine for one or more of those keywords. Such link would appear under the heading “sponsored links” typically on the right-hand side or on the upper part of the screen. A “fee for the referencing service is payable by the advertiser for each click on the advertising link” (*Google v. Louis Vuitton*, 25). With the AdWords mechanism, there is an entity that directly benefits from the use of fashionable, popular, luxury fashion brand names such as “Louis Vuitton”. This is the provider of the AdWords service (Google in this instance). Fashion brands, on the other hand, are affected by externalities that can be both positive and negative. The ability to search for a particular brand on a search engine would draw attention to that brand, could bring new customers and consolidate existing clientele. Conversely, depending on the results that an internet search leads to, the use of AdWords could divert sales and harm the distinctive character of the brand. This occurs, for example, when a third party's ad suggests that there is an economic link between that third party and the proprietor of the trade mark but that suggestion is unwarranted (*Google v. Louis Vuitton*, 89).

The behaviours and perceptions of reasonable internet users who are the target of online advertising however are also changing over time. Reasonable internet users have learnt lessons from the continuous presence of advertising content on their screens. They have become used to seeing ads and, following a search for a given brand, do appreciate that competitors of leading brands may advertise similar products to those requested by entering the name of fashion designers or particular collections or branded products as keywords in internet searches (*Cosmetic Warriors Ltd v. Amazon.co.uk Ltd*, 45).<sup>24</sup>

It has been argued that time is required to fully appreciate how the notion of internet user devised by the Court of Justice is likely to change the notion of the average consumer in the long run (Dinwoodie & Gangjee, 2016, p. 366, fn 140). However, while the approach and strategies of trade mark owners and consumers in the online sphere are subject to factual, rapid and constant changes, a difficulty remains in the recognition and appreciation of such changes as part of the assessment of consumers' perception of trade marks in the jurisprudence. *Interflora Inc & Anor v. Marks and Spencer Plc* [2014] EWCA Civ 1403 in the UK helps the formal identification of some key characteristics of the average internet user which also apply to online fashion retail. Firstly, in this context, the "average consumer" as recognised by trade mark jurisprudence and "the reasonably well-informed and reasonably circumspect Internet user" are "one and the same" (*Interflora v. Marks and Spencer*, 112). Secondly, the average consumer continues to be a "hypothetical person" or a normative construct created and defined to set the balance between different priorities and policy considerations that influence trade mark law, from the protection of consumers, to the provision of incentives to free trade in a competitive market (*Interflora v. Marks and Spencer*, 113). Thirdly, the definition of the average consumer does not emerge from a statistical test (*Interflora v. Marks and Spencer*, 114).<sup>25</sup> Fourthly, as it is for the court to decide on the definition of who the average consumer is, it is also for the court to establish whether and the extent to which evidence from actual consumers is required (*Interflora v. Marks and Spencer*, 115). Thus, the tension between normative and empirical conception of the average consumer it is apparent in all the four elements of this assessment.

### 4.3 | Branding multidimensional and multisensory marks

The evaluation of the dialogue between the consumer and the perception of a brand is specifically developed when that consumer is called to experience characteristics of the distinctive sign that are multidimensional and multisensory. The fashion industry consistently relies on figurative and position marks. Figurative marks are trade marks "where non-standard characters, stylisation or layout, or a graphic feature or a colour are used" (Article 3(3) (b) of Commission Implementing Regulation (EU) 2018/626). Pattern marks are defined as trade marks "consisting exclusively of a set of elements which are repeated regularly" (Article 3(3)(e) of Commission Implementing Regulation (EU) 2018/626). Position marks, arguably developed as an extension of figurative marks, are defined as "trade marks consisting of the specific way in which the mark is placed or affixed on the product" (Article 3(3)(d) of Commission Implementing Regulation (EU) 2018/626).

One of EUIPO's examples for a position mark is especially fitting as it evokes the iconic Prada Linea Rossa, known by many fashion lovers. In addition to its graphical representation, the mark is described as follows: "Red stripe placed longitudinally along an item of footwear partly covering the rear area of the sole and partly the rear area of the item of footwear" (EUTM no. 001027747). This position mark is, therefore, an interplay of colours, a stripe and the manner in which these elements are placed on the product in question. In approaching a mark such as this one, the relevant consumer is given the arduous task of distinguishing between the merely aesthetic elements of the product and the trade mark content of the sign. Being attentive to the different aesthetic details of a product does not automatically mean that one will perceive those as valid elements of a trade mark. Conversely, the approach should be one whereby the notional consumer perceives the position mark as "an independent feature being distinguishable from the product itself and thus communicating a trade mark message" (EUIPO, 2020, p. 365).

Stripes appearing on goods such as trainers and sportswear by Adidas are a paradigm of the difficulties that the fashion industry encounters in the protection of certain figurative and position marks, and of the existence of concurrent interests of consumers with varying degrees of attention and attitudes in perceiving the sign as applied to sportswear. The test set by the General Court in one of the disputes between Adidas and Shoe Branding Europe BVBA<sup>26</sup> required the identification of the appropriate degree of attention that such a consumer displays when purchasing sports shoes. According to the EUIPO Guidelines on EU trade marks, a low degree of attention is often

linked with habitual purchases (EUIPO, 2020, p. 826) while a “higher degree of attention can ... apply to goods when brand loyalty is important for the consumer. ... The attention may be enhanced in cases of luxury goods and where the specific product is regarded as reflecting the social status of its owner” (EUIPO, 2020, p. 824). Apparel and fashion accessories cover the whole spectrum.

In confirming that sportswear and sports footwear are “everyday consumer goods” and not specialised goods (*Shoe Branding Europe BVBA v. EUIPO*, 107), the General Court found that the attention of the relevant consumer of these products was average.<sup>27</sup> Notably, this case tells us that defining the level of attention of the average consumer in relation to the goods in question has precise consequences in determining how strong Adidas' stripes are as a brand for sport footwear. Had the Court been prepared to receive the argument that the average consumer's level of attention was high, it would have been more acceptable to think that such a consumer paid close attention to the side of sports footwear and to the figurative or position marks applied to them (*Shoe Branding Europe BVBA v. EUIPO*, 94). Conversely, as the consumer displayed an average level of attention, it became easier to establish a link between the mark Adidas sought to protect—described as “three parallel equally spaced stripes applied to footwear, the stripes positioned on the footwear upper in the area between the laces and the sole” (*Shoe Branding Europe BVBA v. EUIPO*, 7)—and the mark Shoe Branding Europe BVBA sought to register—described as two parallel lines that “run from the sole edge of a shoe and slopes backwards to the middle of the instep of a shoe” (*Shoe Branding Europe BVBA v. EUIPO*, 3). In confirming that there was the likelihood that the relevant public would have established a link between these two marks and that the use of the Shoe Branding's mark could have taken unfair advantage of the reputation of the Adidas' mark, the Court supported the finding that the goods in question were mass-consumption goods, frequently purchased and used by the average EU consumer. Arguably, they were found to be neither costly nor rare, with their acquisition and their use not requiring specific knowledge and with no serious impact on the health, budget or life of consumers (*Shoe Branding Europe BVBA v. EUIPO*, 107).

The favour of the court towards the protection of marks with reputation needs to be evaluated also for its effects on the ability of competing manufacturers who may also want to use stripe motifs as a decorative feature (Anemaet, 2020, p. 191, 198) and this reasoning needs to be added to the critical outcomes ensuing from an existing CJEU assumption that the more a mark is well known, the greater the likelihood of confusion. This assumption is ultimately a normative adjustment of the perception of trade marks by consumers. There is strength in the contrary argument that actually a “trade mark that is well known to consumers is more likely to be remembered, and it is, therefore, less likely that consumers will have an ‘imperfect recollection’ when confronted with a similar trade mark” (Anemaet, 2020, p. 193; see also Weatherall, 2017, p. 75).

Consumers of everyday products who display an average level of attention are not necessarily the correct benchmark (Anemaet, 2020, p. 204). Looking at the way trainers have evolved as products in the fashion industry, it is undeniable that some of them may be more than just mass-consumption goods, they can be expensive, and in some instances they are supplied in limited editions. Designer Virgil Abloh, for example, is a prominent contributor to a movement that elevates casual fashion—and trainers in particular—to collectible art pieces (Anyanwu, 2019, p. 7; Downing Peters, 2019). From this viewpoint, a legitimate argument is that not all trainers are the same and not all the stripes are likely to be perceived in the same way by the consumer. At the time of writing, the Louboutin “sneakers” this author has her eye on are available from the official website of the French designer at the price of £565.<sup>28</sup>

The analysis of the developments on the protection of Louboutin's iconic red sole adds to the discussion on the perception of colour by brand-conscious consumers. It addresses the difficulty that fashion designers and fashion companies may face in securing the registration and protection of nontraditional trade marks consisting of features that they deem distinctive, and the associated potential disadvantages that could emerge for consumers when exclusivity in the use of such features is conferred to a single undertaking.<sup>29</sup> Louboutin's mark was verbally described as follows: it consisted “of the colour red (Pantone 18-1663TP) applied to the sole of a shoe as shown (the contour of the shoe is not part of the trade mark but is intended to show the positioning of the mark)” (*Christian Louboutin*, 9).<sup>30</sup> The key challenge brought to Louboutin's mark was on the ground that the sign in

question consisted exclusively of a shape, to which the red colour was applied, and such a shape added substantial value to the goods and therefore should have been denied protection under Article 3(1)(e)(iii) of Directive 2008/95 (*Christian Louboutin*, pp. 16–18). Here the matter was not one of proof of distinctiveness or determination of confusion. It was one where the average consumer's perception of the sign in question influenced the scope of the excluded subject matter.

The long-awaited judgement by the CJEU marked a victory for Louboutin. To appreciate the significance of the dispute, it is helpful to consider both the Opinion of the Advocate General in its nonbinding nature, and the conclusions reached by the Court. In its Opinion, AG Szpunar considered the degree to which the average consumer's perspective ought to have been taken into account when evaluating aesthetic characteristics that affected the assessment of whether a shape gives substantial value to the goods. The Advocate General was sympathetic to the view that the appeal of certain aesthetic characteristics would be more in demand at certain times and during certain seasons, depending on fashion trends. But those trends were not to be considered as part of the assessment. Notably, also reputation attached to those aesthetic characteristics (i.e., the Louboutin's red soles in this case) was not to be considered as part of the assessment (*Christian Louboutin Opinion*, pp. 47–54).<sup>31</sup> The logic behind this approach was that the designer's reputation is what made—and continues to make—red soles an attractive and valuable fashion icon and, therefore, “excluding the reputation of the proprietor in assessing whether the shape of the goods gives substantial value thereto is necessary to ensure that a trade mark owner [is not] the 'victim of its own success'” (Gommers et al., 2018, p. 911). Also in the task of construing the test of the average consumer, it is necessary to filter his or her perception from what is in fashion at a given time.

The AG submitted that the way in which the consumer perceived the red sole was not decisive in the assessment of whether such a shape gave substantial value to the goods. An additional tier of scrutiny demanded for the analysis to take into account the economic effects that would result from reserving the sign to a single undertaking (*Christian Louboutin Opinion*, 48). This could be interpreted as a normative adjustment. Evaluation of these two elements led the AG to the view that the provision in Article 3 (1)(e)(iii) was to be interpreted “as being capable of applying to a sign consisting of the shape of a product and seeking protection for a certain colour” (*Christian Louboutin Opinion*, 67). The rationale of this point is that the way the mark is perceived by the public does not depend on the distinction between shape, colour or position, but on the identification of the origin of the goods based on the overall impression made by the given sign (*Christian Louboutin Opinion*, 53). This argument confirms and epitomises the presence of a participatory experience by the consumer and a dialogue between that consumer and the brand. Accordingly, it is observed that “the red sole mark is at the centre of semiotic negotiations over brand owners' investment of meaning in their marks and fashion consumers' realisations and re-evaluation of such meanings” (Teilmann-Lock & Brun Petersen, 2018, p. 894), keeping in mind however that perception from an actual consumer needs to be filtered to exact any effects of trends and to ensure that policy goals are appropriately safeguarded.

The judgement by the Court did not go into the level of detail addressed by the Advocate General and did not touch on the perception of the sign by the average consumer. It stressed that, in the interpretation of the wording of the relevant provisions and case law, a colour per se without any outline could not constitute a shape (*Christian Louboutin*, 22). However, it did address the possibility that a particular colour as applied to a specific part of a product could result in the sign at issue consisting of a shape (*Christian Louboutin*, 23). The key finding by the court is that “while it is true that the shape of the product or of a part of the product plays a role in creating an outline for the colour, it cannot, however, be held that a sign consists of that shape in the case where the registration of the mark did not seek to protect that shape but sought solely to protect the application of a colour to a specific part of that product” (*Christian Louboutin*, 24). An implication of this reasoning is that if an applicant does not seek protection for a shape, but for a colour as applied to a specific part of the product, a main element of that sign is indeed the colour and therefore it cannot be said that the sign consists exclusively of a shape (*Christian Louboutin*, 26).

This interpretation has to be read with an eye to the new approach contained Article 4 (1)(e) of Directive (EU) 2015/2436, which applies not only to shapes but also to other characteristics of the disputed sign,<sup>32</sup> and therefore takes into account the reality of trade mark practice and the fact that often trade marks are a combination of features of shape and colour (Brancusi, 2019, pp. 101–102). In particular, the argument developed by the Advocate General and the conclusions reached by the Court highlight the rigour that is required from applicants seeking to register signs that blend shapes, colours and other distinctive characteristics that contribute to the uniqueness of fashion brands. The degree to which the average consumer's perception of the sign will influence the assessment remains an open question (Rosati, 2019, p. 916), and it is likely to evolve alongside the expansion of legal challenges brought to marks that present a varied combination of multidimensional and multisensory features.

## 5 | CONCLUSIONS

The fashion industry offers insightful guidance in the process of understanding the role of two recurrent characters, or *personae*, in design law and trade mark law. This article analysed the roles assigned to the informed user and the average consumer as they experience fashion designs and brands. Judges maintain that it is for them to provide the applicable definition, on the basis of the relevant sources and the facts of the case. Accordingly, it has been demonstrated that courts have left the door open for some empirical or factual evidence, which is typically industry-specific, to inform the corresponding legal definitions and tests. The same courts have included normative adjustments aimed at safeguarding policy objectives. Through legislative reform, policy makers can also exercise an influence, guided by normative priorities and with inputs from industry stakeholders, for example, in the process of public consultations. In summary, the analysis presented in this article upholds the view that the characteristics of the notional user or consumer may be viewed as simplifications, exaggerations, elaborations of the traits that real users or real consumers display in the way they experience products such as apparel and fashion accessories. The law imposes a normative filter on the mask to be worn by the notional user or consumer. The acknowledgement that a gap exists between legal tests and reality, and that this may lead to outcomes that are not optimal does not lessen the significance of those *personae* who are not simple background actors confined to the imagination of those who contribute to the shaping of a legal narrative, but experienced protagonists holding the ability to set the boundaries and influence the implementation of design law and trade mark law.

## ENDNOTES

<sup>1</sup>Joined Cases C-468/01P to C-472/01 P–*Procter & Gamble v. OHIM*.

<sup>2</sup>The potential impacts of the consumer as regulators highlight the opportunities of regulatory pluralism involving multiple stakeholders. Such pluralism extends law-making beyond regulatory bodies and the judiciary (as discussed in Hodges, 2018, p. 253).

<sup>3</sup>Or πρόσωπον in Greek.

<sup>4</sup>C-281/10 P–*PepsiCo Inc v. Grupo Promer Mon Graphic SA*.

<sup>5</sup>The court in *Pulseon OY v. Garmin (Europe) Ltd* [2019] EWCA Civ 138, 18 indicates that the controversy is yet to be resolved.

<sup>6</sup>The discussion below on T-629/16–*Shoe Branding Europe BVBA v. EUIPO* clarifies this point.

<sup>7</sup>C-342/97–*Lloyd Schuhfabrik Meyer v. Klijsen Handel BV*.

<sup>8</sup>*Philips Electronics BV v Remington Consumer Products*, [1998] RPC. 283, 318.

<sup>9</sup>*Procter & Gamble Company v Reckitt Benckiser (UK) Ltd* [2007] EWCA Civ 936, 4.

<sup>10</sup>*Samsung v Apple* [2012] EWHC 1882 (Pat), 32.



- <sup>11</sup>*Samsung v Apple* [2012] EWHC 1882 (Pat), 189.
- <sup>12</sup>*J Choo (Jersey) Limited v. Towerstone Limited and others* [2008] EWHC 346 (Ch)
- <sup>13</sup>C-345/13–*Karen Millen Fashions Ltd v. Dunnes Stores*, 35.
- <sup>14</sup>T-22/13 and T-23/13–*Senz Technologies BV v. OHIM, Impliva B (Parapluies)*.
- <sup>15</sup>T-153/08–*Shenzhen Taiden Industrial Co. Ltd v OHIM*. See also Joined Cases T-83/11 and T-84/11–*Antrax It v OHIM-THC (Radiators for Heating)*, 94–96.
- <sup>16</sup>T-525/13 and T-526/13–*H&M Hennes & Mauritz BV & Co KG v. OHIM–Yves Saint Laurent SAS*.
- <sup>17</sup>See the approach by the General Court T-9/07–*Grupo Promer Mon Graphic v OHMI–PepsiCo*, 54–84 (as upheld by the Court of Justice, C-281/10 P–*PepsiCo Inc v. Grupo Promer Mon Graphic SA*, 53–61).
- <sup>18</sup>T-666/11–*Budziewska v OHMI–Puma (Félin bondissant)*, 21; T-57/16–*Chanel SAS v EUIPO*, 27.
- <sup>19</sup>The decision uses Recital 14 of the Design Regulation as an interpretative tool (as indicated in paragraph 21) and the four-stage examination reflects this approach.
- <sup>20</sup>T-90/16, *Thomas Murphy v EUIPO*.
- <sup>21</sup>T-210/18–*Porsche v EUIPO–Autec (Voitures)*.
- <sup>22</sup>C-259/04–*Elizabeth Florence Emanuel v. Continental Shelf 128 Ltd*.
- <sup>23</sup>C-236/08–*Google France, Google Inc v. Louis Vuitton Malletier*.
- <sup>24</sup>*Cosmetic Warriors Ltd v. Amazon.co.uk Ltd* [2014] EWHC 181 (Ch).
- <sup>25</sup>"[T]he average consumer test is not a statistical test in the sense that, if the issue is likelihood of confusion, the court is not trying to decide whether a statistical majority of the relevant class of persons is likely to be confused" (Arnold J in *Interflora Inc v Marks & Spencer Plc* [2013] EWHC 1291 (Ch)).
- <sup>26</sup>T-629/16–*Shoe Branding Europe BVBA v. EUIPO*
- <sup>27</sup>As in T-461/15–*Guccio Gucci SpA v. EUIPO*. Following this decision, Gucci filed an Appeal Case before the Court of Justice (C-674/16P). The parties subsequently reached an amicable settlement.
- <sup>28</sup>Christian Louboutin's sneakers collection—[http://eu.christianlouboutin.com/uk\\_en/homepage-1/women-1/shoes/sneakers.html](http://eu.christianlouboutin.com/uk_en/homepage-1/women-1/shoes/sneakers.html)
- <sup>29</sup>This difficulty may be justified in consideration of the potential negative impact, identified and discussed by Calboli, emerging from the protection of features such as the Louboutin red sole, or Gucci monogrammed patterns and stripes, or Bottega Veneta's intrecciato pattern if protection of these features as trade marks leads fashion houses to continue repeating products displaying these features, with less investment channelled towards design innovation and enhancement of the quality of products (Calboli, 2018, p. 307).
- <sup>30</sup>C-163/16–*Christian Louboutin, Christian Louboutin SAS v. Van Haren Schoenen BV*.
- <sup>31</sup>Advocate General Opinion in C-163/16–*Christian Louboutin, Christian Louboutin SAS v. Van Haren Schoenen BV* (February 6, 2018).
- <sup>32</sup>AG Szpunar's commented on the possible effects of the exclusion as reworded in Article 4 (1) e of Directive (EU) 2015/2436 (*Christian Louboutin Opinion*, 41).

## ORCID

Maria Mercedes Frabboni  <http://orcid.org/0000-0003-3293-1849>

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**How to cite this article:** Frabboni MM. Fashion designs and brands: The role of the informed user and the average consumer. *J World Intellect Prop*. 2020;1–17. <https://doi.org/10.1111/jwip.12176>